No. 12961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

Appellants,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE and HARRY WYNN; UNITED STATES OF AMERICA and RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Brief of Appellees, Herschel Bullen, Mary H. Bullen, J. C. Hayward and Mary S. Hayward.

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Introductory Statement.

Herschel Bullen, Mary H. Bullen, J. C. Hayward and Mary S. Hayward, who have heretofore filed their opening brief as appellants in this case, submit this brief as appellees in the appeals taken by the other parties to the action.

In so far as the opening brief of the appellants Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn is concerned, these appellees have only one point to make, and that is that on page 4 there is an error in the statement of the case. We refer to the following statement:

> "That the United States Government, Reconstruction Finance Corporation, Treasure Company, Mr. and

> Mrs. Bullen and Mr. and Mrs. Hayward did not file any petition for distribution of compensation in the condemnation award made by the jury."

A petition for distribution of the share of the award to which they are entitled was duly filed by the Bullens and Haywards [R. 101]. Apart from the foregoing, these appellees join in the arguments made by the opening brief of said appellants.

The brief of the United States may be disposed of by pointing out that it raises a moot question.

The Government makes the erroneous assumption that the Beaumont judgment put a value on the lessee's interest in the Fletcher and the Burns No. 1 leases, refers to the erroneous finding by Judge Westover that the Beaumont judgment valued the lessee's interest in the Fletcher lease, and then says, at page 17 of the brief:

> "Since it is clear that under these findings the judgment based thereon stands as an adjudication that the United States has not paid for the Burns No. 1 leasehold, *thus exposing the Government to this further liability,* the Government filed a motion to vacate those findings . . ." (Emphasis added.)

This is a fallacy in the Government's brief. It is not exposed to any further liability.

The parties to the condemnation action are bound by the Beaumont judgment, whatever it means. They have all had their day in court, and cannot come back upon the Government for any further claims relating to the Burns No. 1 lease, the Fletcher lease, or any of the other property condemned.

As to persons, if any, who are not parties to the action, and who might have an interest in either lease, they have

long since been barred by the statute of limitations from asserting any claims for compensation on account of the taking of such interests. An order of possession was made in the condemnation case on September 28, 1942 [Finding V, R. 137]. A Declaration of Taking was filed by the Government on October 26, 1942 [R. 73]. The statute of limitations on actions to recover for property taken by the United States is six years (28 U. S. C. A. 2401). This section reads in part as follows:

> "Sec. 2401(a). Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

The brief of the R. F. C. is based in part upon the same erroneous interpretation of the Beaumont judgment, *i. e.,* the assumption that it values the Fletcher and Burns No. 1 leaseholds. It further assumes, without support in the record, that the valuation should be distributed between the two leases on the basis of the number of lots covered by each, and assigns 3/7ths of the value to the Fletcher lease, it covering three lots, and 4/7ths to the Burns No. 1 lease, it covering four lots. The R. F. C. interprets the Vickers judgment as limiting the royalty holders to an interest in the Fletcher lease. From these three premises it reasons that the royalty holders have a percentage in only 3/7ths of the entire award. The reasoning is sound, but the premises, or at least, the basic premise that the Beaumont judgment values leases, are incorrect.

Summary of Argument.

It is the position of the appellees Bullen and Hayward that upon the termination of the agreement of April 5, 1938, their assignor, Walter B. Scoville, had left only a participating royalty in one well, Treasure Well No. 8; and, therefore, that if any other wells could have been drilled upon either the Fletcher lease or the Burns No. 1 lease, they would not share in such wells; that the Beaumont judgment valued the property in which appellees had an interest, to-wit, the working interest in Treasure Well No. 8; that the entire award of $194,500.00 was given for that interest only; that if any interest in either lease was left unvalued, no one was hurt thereby, because the R. F. C. succeeded to all interest of the lessee under both leases, and, as noted above, no claim can now be made against the Government; and that the question of what rights the holders of royalty interests in the one well might have in either lease is academic, because the only right that could be of value would be the right to drill wells, and no additional wells could be drilled on either lease; that the Vickers case is, therefore, immaterial and it is also immaterial as far as these appellees are concerned; because they were not parties to the action.

Argument.

The participating royalty interests involved in this case were created by the agreement of April 5, 1938, between the R. F. C.'s predecessor in interest, Treasure Company, therein referred to as First Party, The Adamant Company, referred to in the agreement as Second Party, and Walter B. Scoville, therein termed Third Party [Treasure Company's Ex. QQ in this proceeding].

The agreement shows that while the well was drilled upon the Fletcher Lease, the Burns No. 1 Lease had been combined with it as a drill site, presumably because there was not enough area in the Fletcher Lease to meet the legal requirements for a drill site. In any event, Treasure Company owned both leases, and they were so combined. The agreement contains the following paragraph in the preamble:

> "WHEREAS, First Party has acquired an Oil and Gas Sub-Lease from Robert S. Burns and Sarane Otis Burns, his wife, covering Lots Seven (7), Eight (8), Thirty-five (35) and Thirty-six (36) in the above described Block and Tract, which said Sublease it is proposed to combine with the above mentioned Fletcher lease into one drillsite; and"

Another part of the preamble reads as follows:

> "WHEREAS, First Party now desires to complete said well on the Fletcher lease and the Burns No. 1 lease, and to drill a second well on Burns No. 2 lease, and its third well on Burns No. 3 lease . . ."

The agreement further provided that Second Party, the Adamant Company, and Third Party, Walter B. Scoville, were to have a participating royalty in the various leases.

On page 4 it was specified that they were to get royalties as follows:

> "(a) To Second Party, a twenty-five per cent (25%) participating royalty interest on all of the above described leases.
>
> (b) To Third Party a participating royalty interest of nineteen percent (19%) to the Fletcher and and Burns No. 1 lease if the well is completed for less than one thousand (1,000) barrels, . . ."

Finally, there was a provision on page 5 for termination, as follows:

> "It is also understood that should the first well be completed for two hundred (200) barrels per day or less, this contract shall terminate, and Second Party and Third Party will thereupon quitclaim to First Party all of their interests hereunder, *except as to such first well.*" (Italics ours.)

The first well, Treasure Well No. 8, was completed for less than 200 barrels per day, so that this clause became operative. The result was that while the parties started out with an interest in *leases,* they wound up with an interest *in a well.*

The *Vickers* case was a suit brought by Walter B. Scoville, The Adamant Company, and their assignees, J. O. Seeple and Harry Wynn, as plaintiffs, against G. de Bretteville and Treasure Company, a corporation, as defendants. The complaint was filed on June 1, 1939, and the judgment was rendered on November 27, 1940 [Finding III in this proceeding, R. 136]. Long before the complaint was filed, Walter B. Scoville, one of the royalty

holders under the agreement, and one of the plaintiffs in the *Vickers* case, made an assignment of two 1% participating royalty interests to the appellees Bullen and Hayward, and notice thereof had been given to the lessee, Treasure Company. These assignments were executed October 22, 1938 [Ex. 2 of petitioners Bullen and Hayward]. An application filed with the Commissioner of Corporations under date of September 30, 1938, asking for consent to transfer the royalties in escrow, was signed by Treasure Company, thereby establishing its knowledge of the assignment [Ex. 2 of petitioners Bullen and Hayward]. After this, the Bullens and Haywards, as holders of the assigned participating royalties, looked to Treasure Company, the operating lessee, for payment of their royalties, and no litigation thereafter taking place between the assignor, Scoville, and Treasure Company, to which these appellees were not parties, could change their rights.

Since the *Vickers* case cannot affect the rights of the appellees Bullen and Hayward, we will leave to counsel for Walter B. Scoville further discussion of that case. We may point out, however, that if we are right in the argument that the Beaumont judgment valued only the working interest in Treasure Well No. 8, then the *Vickers* case is immaterial in any event. The only purpose it serves is as a prop to the argument of the R. F. C. If, as the R. F. C. contends, the Beaumont judgment valued the Fletcher Lease and the Burns No. 1 Lease, then they have to rely on the *Vickers* case for their proposition that the royalty holders had no interest in the Burns No. 1 Lease. If, on the other hand, the entire award of $194,500.00 was given for the working interest in Treasure Well No. 8, and for that only, then whether or not the royalty holders had any interest in the Burns No. 1 Lease

is of no consequence. It is conceded by everyone that they did retain their interest in Treasure Well No. 8.

On the question of the *Vickers* judgment, while the Bullens and Haywards are not bound by the finding which Judge Vickers made that the well was brought in for less than 200 barrels per day, they concede this to be the fact, and therefore concede that their rights as participating royalty holders, which were derived from the rights of Walter B. Scoville under the April 5, 1938, agreement, were terminated, except for the continuing interest in the one well, Treasure No. 8. The nature of that interest, however, is a matter for the decision of this court, and is not in any way affected by the Vickers judgment.

In the case at bar, Judge Westover held [1st Par. Finding IV, R. 151], that the participating royalty assignments constituted an interest in real property, and this conclusion has not been questioned by anyone. It may not be amiss, however, to point out that it is squarely supported by the decision of the California Supreme Court in the leading case of *Schiffman v. Richfield Oil Co.,* 8 Cal. 2d 211, 64 P. 2d 1081.

In that case the owners of an oil lease sold participating royalties in order to finance the drilling of a well. As said by the court at page 217:

> "The participating agreements gave the purchaser a right to share in the proceeds of production from one well only . . ."

The lease was sold to Richfield Oil Co., which the court found was chargeable with knowledge of the outstanding agreements. The company contended, among other things, that the participating oil agreements were only the personal obligations of the issuer (p. 214). The court held

that the royalty holder had an interest, which was not an undivided interest in the lease, and which it refused to define, but which would run against a purchaser of the lease with notice (p. 227).

The effect of this holding is necessarily that such a royalty holder has a property interest, and the case has been cited to that effect many times, *e. g., Recovery Oil Co. v. Van Acker,* 79 Cal. App. 2d 639 at 642, 180 P. 2d 436 at 438; *La Laguna Ranch Co. v. Dodge,* 18 Cal. 2d 132 at 138 and 139, 114 P. 2d 351 at 355.

If the holders of the participating royalties in Treasure Well No. 8 had an interest in real property, as the California law clearly establishes, it was the duty of the Government to pay the fair market value of that interest when it was taken as a result of the condemnation of the fee, and this brings us to the question of what the Beaumont judgment means.

In the jury's verdict which is incorporated in the Beaumont judgment, there are two columns. One is headed "Interest." In this column are listed a description of the various interests in the property condemned. (The Government, of course, condemned the fee simple absolute in all the property, including the premises covered by the Fletcher and the Burns No. 1 leases, but the jury valued the separate interests in the various properties.) [R. 69-72.] There is a second column headed "Fair Market Value," under which the value of each interest is set forth opposite the description thereof. The description of the item with which we are concerned, and the value assigned to it, are, respectively, as follows [R. 71]:

"H-1—Being the total working interests W-I in Treasure Company Well Treasure No. 8 $194,500.00"

The foregoing language would seem to dispose of any argument as to what the symbols "H-1" and "W-I" mean. They are specifically defined by the judgment itself as the total working interest in Treasure Company Well Treasure No. 8. This working interest is, of course, made up of the rights held by the various participating royalty holders and the remaining portion held by the lessee, Treasure Company, the predecessor in interest of the R. F. C.

We submit that there is no reason to look further than the face of the judgment for its proper interpretation. In this connection, it is to be noted that the parol evidence rule applies to judgments as well as to other documents. A good general statement of the rule is to be found in 49 Corpus Juris, Section 863, where it is said:

> "If the language used in a judgment is ambiguous there is room for construction, but if the language employed is plain and unambiguous there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used."

Another good statement is found in *Harrison v. Manvel Oil Co.,* 180 S. W. 2d 909, where the court says at page 914:

> "Practical consideration supports the conclusion that an unambiguous description in a judgment affecting land should not be open to contradiction or interpretation by examination of the evidence admitted at the trial."

The judgment given by Judge Beaumont which valued the property was entered July 13, 1949 [R. 79], and has long since become final. Yet the Government and the

R. F. C. ask this court to review a lengthy record to determine what the witnesses meant when they testified concerning the value of certain property mentioned in the judgment. That burden should be imposed upon the court only if there is ambiguity in the judgment.

This is true whether the judgment is right or wrong. An examination of the testimony of the expert witnesses which is summarized in the briefs of the R. F. C. and the Government will show, however, that there is no error in the judgment. These experts gave their opinions as to the value of the well, and that only. They arrived at it by estimating the remaining amount of oil and gas which could be produced from that one well, and deducting the estimated expenses, which included the payment of landowners' royalty to the two landowners under the Fletcher and the Burns No. 1 leases. There is not a word in their testimony to indicate that they had in mind any values which might be reached by other wells, or even to indicate a possibility that other wells could be drilled on either lease.

On the contrary, the Government's star witness, Dr. Dodge, testified specifically that he was not considering any other values. On direct examination, he indicated that he was valuing the same thing which the jury and the judgment ultimately valued, to-wit, the working interest in Treasure Well No. 8. He says [R. 307]:

> "I have placed upon the map the symbol: H-1 Working Interest, to designate the value which I have given is the working interest in the Well Treasure 8 located on Parcel H."

On cross-examination by the defendant Johnson, Dr. Dodge testified as follows [R. 350]:

> "Q. (By Mr. Johnson): I don't know whether I asked this question or not, but did you in evaluating any of the interests in H-1 give consideration to the possibility that additional wells might be drilled on the lease? A. No, we did not. That is a lease of one acre and no additional wells could be drilled on the lease within the law.
>
> Q. At the point of take-over would you have given consideration to the prospect that additional wells would be drilled on that lease that was a part of the value as of that date?"
>
> * * * * * * * *
>
> "The Court: Can you answer the question, Mr. Dodge? [R. 352.]
>
> The Witness: It is impossible to answer the question because the lease in question consisted of one acre only and under the law of the State of California no additional wells could be drilled."

The testimony continued, and showed that the one acre of which the witness spoke was the area both of the Fletcher lease and the Burns No. 1 lease, though the witness does not refer to it as Burns No. 1 at this point. He does give the lot numbers, however, Lots 9, 10 and 11 being the Fletcher lease, and Lots 7, 8, 35 and 36 being the Burns No. 1 lease [Finding I, R. 135], and he does refer to the map designation of the Burns No. 1 lease, G-3 [Finding X, R. 139].

Dr. Dodge's testimony continued as follows [R. 352]:

"Mr. Johnson: I don't know the area of the entire lease.

The Witness: The area is slightly under 50,000 square feet.

Q. (By Mr. Johnson): Is that the entire lease? A. That is the entire lease of both the Fletcher lease and the Herndon Development lease. They comprise slightly under 50,000 square feet. My recollection is 47,000-some odd square feet.

Q. Mr. Dodge, I will show you Johnson's Exhibit A for identification, being an assignment of participating royalty and call your attention to four paragraphs of descriptions and ask you whether or not the first two smaller paragraphs alone relate to the acre upon which Well No. 8 is drilled? A. Yes. That is correct, the first two. The first paragraph contains Lots 9, 10 and 11 and refer to the so-called Fletcher parcel which has been labeled H. The next paragraph includes Lots 7, 8, 35 and 36 and refers to the four additional lots which I believe have been labeled G-3, if I am not mistaken.

Mr. McPherson: That is right.

The Witness: And those are the lots and comprise the entire lease upon which the Treasure well was drilled."

The statement of the witness that it was impossible to drill additional wells on these leases was correct as a matter of law. At the time the well, Treasure Well No. 8, was drilled, Section 1, Chapter 586 of the California Statutes of 1931, p. 1277, effectively prohibited the drilling of any additional well on the Fletcher lease, and the drilling of any well on the Burns No. 1 lease, after it had been combined with the Fletcher lease to constitute a drillsite for

the well which was then in process of being drilled upon the Fletcher lease. That statute reads in part as follows:

> "Section 1. Any well hereafter drilled for petroleum . . . which is located within 100 feet of an outer boundary of the parcel of land upon which said well is situated . . . is hereby declared a public nuisance; . . ."

It will be noted that this statute required a surface area of 200 x 200 feet, or 40,000 square feet, for the drilling of one well. The testimony of Dr. Dodge above quoted shows that the two leases comprise an area of "47,000-some odd square feet."

No other well was ever drilled, and at the time the property was condemned by the Government the same law was then in effect, it being found at that time in Section 3600 of the Public Resources Code. In view of the foregoing, Dr. Dodge very properly treated as academic the question of whether other wells could be drilled, and gave no consideration to that factor in arriving at his value for the working interest of Treasure Well No. 8.

Interesting questions might be raised as to what rights the holders of a royalty in one well have in the lease upon which the well is drilled, and it would be a still more interesting question as to whether they have any rights in an adjoining lease which was used only to make up a legal drillsite.

It is doubtless true that the royalty holders could prevent any fraudulent surrender of the Fletcher lease which would put it beyond the power of the lessee to continue to produce the well in which they had an interest, and which was located upon that lease. *Cf. La Laguna Ranch Co. v. Dodge,* 18 Cal. 2d 132, 114 P. 2d 351. *The Schiff-*

man case, *supra,* clearly establishes that any transferee of the leasehold, with knowledge of their rights, would take subject to them. As for the Burns No. 1 lease, it may well be that after having served its purpose of constituting a part of a designated parcel for the drilling of the well, the persons whose rights were confined to that well would have no further use for the adjoining lease, the Burns No. 1, although, of course, their obligation would continue to pay landowner's royalty to the lessor under that lease. He would be entitled to such royalty at the agreed rate out of the production from the well on the Fletcher lease, in consideration of his having permitted the joinder of the two leases, thus limiting the availability of the Burns No. 1 premises for drilling. Under the statute, the unavailability of the premises would continue. The same statute cited above prohibited the drilling of a well within 150 feet of any well theretofore drilled upon the designated parcel. Public Resources Code, Section 3600. Possibly the royalty holders in the one well on the Fletcher lease would have some rights to enforce this statute. Aside from that, they would certainly have no right to prevent the drilling of any number of additional wells upon either the Burns No. 1 lease or the Fletcher lease.

While they are interesting, these questions do not arise in the case at bar. We are concerned here with the distribution of a fund which was paid for an interest in certain property. The wording of the *Beaumont* judgment making the award for that property, and the testimony supporting the judgment, establish beyond doubt that the money was paid for the working interest in one well, and no one has questioned the fact that the royalty holders have their full percentage interests in

that one well. Certainly there can be no question about what the Bullens and Haywards have. Any argument based upon the *Vickers* judgment cannot apply to them, because they were not parties to it, and there can be no doubt that they have a full 2% interest in Treasure Well No. 8, together with all rights thereunto appertaining.

Conclusion.

It appears, therefore, that Judge Westover was correct in his ultimate conclusion that the royalty holders had the percentage interests called for by their respective assignments in the entire award made by the jury, and that the judgment in this regard should be affirmed.

Respectfully submitted,

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